Supreme Court, U.S.
FILED

No. 93-285

In The

Supreme Court of the United States

October Term, 1993

ROBERT A. LEVY,

Petitioner,

vs.

UNIVERSITY OF CINCINNATI,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Ohio First Appellate District

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When an unpleaded affirmative defense is fully briefed by the parties in summary judgment proceedings, and where the parties have received full opportunity to introduce all evidence pertinent thereto, does an appellate court's reliance on the unpleaded affirmative defense as a ground of affirmance deny due process of law to a defendant against whom summary judgment was granted?

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STATEMENT OF THE CASE

The Petitioner served as an untenured associate professor of physics at the University of Cincinnati from 1963 to 1969.[1] His employment commenced pursuant to a letter dated June 10, 1963 (hereinafter the "June letter") from the head of the Department of Physics in the University of Cincinnati's College of Arts and Sciences. (Petitioner's App. 29-33). The material portions of the letter read as follows:

> For next year I can offer you a visiting *associate* professorship at a straight salary of $10,500 for the academic year. The rank and salary are those which we would offer on a regular appointment. If everything were mutually satisfactory, a *regular* appointment of an associate professorship would be offered you for the following year. Such appointments are usually made for a period of three years and are renewable for a second three year period. At the end of that time the faculty member has tenure. (Emphasis in original).

By letter dated June 22, 1963, the Petitioner responded that "I am happy to accept the appointment as visiting associate professor." (Petitioner's App. 34). At the time the Petitioner accepted the University's employment offer, visiting professorships were limited term appointments, with no expectancy of reappointment, and with no right to consideration for tenure under the University's formal, written tenure policy.

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[1] The background facts recited herein are based upon the pleadings and the evidentiary record compiled in the summary judgment proceedings in the Court of Common Pleas.

The Petitioner commenced his employment with the University in September, 1963, and his colleagues in the Department of Physics apparently became enamored of him rather quickly. Accordingly, on November 7, 1963, the Dean of the College of Arts and Sciences proposed that the Petitioner receive a three-year regular faculty appointment in lieu of his one-year visiting professorship. The University administration acceded to this request, which resulted in a letter to the Petitioner from the Dean of the College dated December 2, 1963 (hereinafter the "December letter"). (Petitioner's App. 35-36). So far as is pertinent to the issues tried below, the December letter provided as follows:

> Upon the recommendation of Professor William Wright and with the approval of the Board of Directors of the University of Cincinnati, it is my pleasure to advise that your appointment as Visiting Associate Professor of Physics for the period 9/1/63 through 8/31/64 has been changed to that of Associate Professor of Physics for the period of 9/1/63 through 8/31/66. Your teaching and payroll basis will continue on a ten-month basis.
>
> As you know, according to the By-laws and Regulations of our Board of Directors, Associate Professors shall be appointed by the Board for a term of three years or five years. At the expiration of the initial five-year or second three-year appointment *if they are reappointed* they shall have indefinite tenure within the age limits

> hereinafter set forth. In your case the three-year provision applies. (Emphasis added).[2]

The conditions for tenure cited in the December letter were a verbatim recitation of the conditions set forth in Section 39(a)(3) of the by-laws and regulations of the board of directors of the University, which were in evidence in the trial court proceedings. Section 39(a)(3) was in effect at all times during the Petitioner's employment with the University.

As the Petitioner completed the second year of his initial three-year appointment to the regular faculty, the ardor of his colleagues had cooled substantially. On October 14, 1965, the head of the department of physics wrote to the Petitioner to express dissatisfaction with the Petitioner's research activities, which were not perceived as meeting the expectations of a faculty member brought to the university in a "senior position." The letter also stated that:

> I have recommended to Dean Weichert that you be reappointed for a three-year period. Since *another reappointment at the end of this period* would involve tenure, it is extremely important that you step up your research activities. (Emphasis added).

In accordance with the department head's correspondence with the Petitioner, on December 7, 1965, the dean

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[2] The Petitioner asserts (Petitioner's Brief 3) that the December letter was "ostensibly signed by the dean, [but] the signature was not his." However, the record in the trial court established that the letter was sent by the dean's administrative assistant while he was out of town, and that she signed his name pursuant to authority granted by him.

of the college wrote to the Petitioner indicating that his "reappointment for the period 9/1/66 – 6/30/69 has . . . been approved."

On October 18, 1968, the dean of the college wrote to the Petitioner as follows:

> According to the By-laws and Regulations of the Board of Directors of the University of Cincinnati, a Faculty member not to be continued in service after the term of his appointment shall be notified by his Dean not later than November 1 of the academic year in which the probationary period expires.
>
> This is to inform you that you are not being recommended for reappointment for 1969-70.

In accordance with the communication of October 18, 1968, the Petitioner's appointment as an associate professor expired according to its terms on June 30, 1969, and he was not reappointed. Accordingly, the Petitioner had not met the conditions for an award of tenure as specified in the December letter, the department head's letter of October 14, 1965, or the pertinent provisions of the by-laws and regulations of the University's board of directors.

The Petitioner commenced his suit against the University in 1975. Thereafter, the litigation followed a tortious path which, in general, is accurately summarized in the Petitioner's Statement of Facts. (Petitioner's Brief 4-6). Although the Petitioner's suit urged numerous peripheral contract and tort claims, the overriding issue raised by him involved his claim of a contractual right to an award of tenure.

In the summary judgment proceedings that led to the final judgment now before this Court, the Petitioner urged that a literal reading of the June letter ("at the end of that time the faculty member has tenure") established his contractual right to receive tenure. The University, on the other hand, urged in its motion for summary judgment that the Petitioner's rights were governed not by the June letter, but rather by the December letter which had extended to him a three-year regular faculty appointment, in lieu of the original one-year appointment to a visiting professorship. Thus, the University's motion fully alerted the Petitioner to the University's reliance on the December letter as the controlling contractual document. The Petitioner's full understanding of the University's position was evidenced by his memorandum opposing the University's motion for summary judgment, in which he urged that the terms of the June letter remained in effect, and were not and could not be replaced by those of the December letter; that he did not consent or agree to the terms of the December letter; and that there was no consideration to support the December letter as a contractual document.

The Petitioner submitted his own affidavit and documentary evidence in support of his memorandum opposing the University's motion for summary judgment, and was free to submit any and all evidence that he believed supported the contentions argued in his memorandum. Following oral arguments, the trial judge permitted the Petitioner to submit an additional brief in support of his position. At the time the Petitioner filed his supplemental brief, he submitted additional evidentiary materials in

connection therewith, without objection by the University.

The University also independently argued in the summary judgment proceedings that under state law the University's formal, written tenure regulations precluded reliance by the Petitioner upon the terms of the June letter.[3]

The University's summary judgment motion was granted by the trial court by general entry. (Petitioner's App. 13-14). The Court of Appeals affirmed the trial court decision.[4] (Petitioner's App. 1-12).

So far as is pertinent to the matters raised in this Court, the Court of Appeals affirmed the trial court's summary judgment order on alternative and independent grounds. First, the Court of Appeals held that the December letter "establishes new rights and obligations and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of the employment established by the June letter." (Petitioner's App. 7). Additionally, noting that the University had a formal

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[3] A prior motion for partial summary judgment by the University had been made without supporting evidentiary materials. That summary judgment decision favorable to the University was reversed by the First District Court of Appeals of Ohio and the unpublished decision is set forth in Petitioner's Appendix 15-26. Accordingly, neither the December letter nor the University's published tenure regulations had been authenticated and placed in evidence until the 1991 summary judgment motion of the University.

[4] The Court of Appeals decision is now reported as 84 Ohio App.3d 342 (1992).

tenure system, the Court of Appeals held that since Petitioner had "been advised on October 8, 1968, in accordance with the by-laws, that he was not being recommended for reappointment at the end of his second three-year term as associate professor, [he ha]d not met an essential condition precedent to his tenure," citing *Omlor v. Cleveland State University*, 45 Ohio St.3d 187, 543 N.E.2d 1238 (1989), syllabus. (Petitioner's App. 7).

The Petitioner's application for reconsideration, wherein he initially raised the due process claim now asserted before this Court, was overruled by the Court of Appeals. (Petitioner's App. 27). The Petitioner's appeal as of right to the Supreme Court of Ohio was dismissed for want of a substantial constitutional question.[5] (Petitioner's App. 28). Thereafter, the Petitioner timely prosecuted his petition for a Writ of Certiorari to this Court.

ARGUMENT

I. REASONS FOR DENYING THE WRIT OF CERTIORARI

The Ohio Court of Appeals Opinion evidences an alternative state law ground of decision which is adequate and independent, and which precludes Supreme Court review of the federal due process question.

The opinion of the Court of Appeals rests on alternative state law grounds. First, the court characterized the December letter as a "novation" which superseded the June letter. Second, the court held that, in accordance

[5] Reported at 66 Ohio St.3d 1484, 612 N.E.2d 1241 (1993).

with *Omlor v. Cleveland State University, supra,* the Petitioner's claim of entitlement to tenure was precluded by his failure to qualify under the University's formal tenure policy. The Petitioner recognizes the existence of these independent grounds for the opinion of the Court of Appeals. (Petitioner's Brief 9-10). The Petitioner's claim of surprise and consequent denial of his right to procedural due process relates only to the first stated ground of decision, and the Petitioner recognizes that the University asserted *Omlor* as a basis of decision in its summary judgment motion. (Petitioner's Brief 8).

This Court has long recognized that –

> where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S. Ct. 183, 80 L.Ed. 158 (1935).

Although *Fox Film Corp, supra,* and its progeny largely involve state court decisions resting on alternative federal and state law grounds, the limitation on jurisdiction long recognized by this Court should be not different where, as in the case at bar, the state court decision is grounded on two alternative and independent state law bases, only one of which is asserted to be invalid because of a procedural due process deficiency. For, as this Court has observed, "[b]y its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for

the state court's judgment. . . . " *Harris v. Reed*, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 103 L.Ed.2d 308 (1989).

In the case at bar, it is beyond question that there is an adequate and independent basis for the holding of the Ohio Court of Appeals. The two alternative grounds of decision are "[not] so interwoven . . . [so] as not to be an independent matter, [nor is the alternative ground of decision] not of sufficient breadth to sustain the judgment without any decision of the other. . . . " *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 61 L.Ed. 644 (1917).

Since the Ohio Court of Appeals based its decision on an adequate and independent state law ground, this Court should decline to issue a Writ of Certiorari.

II. QUESTION PRESENTED FOR REVIEW

When an unpleaded affirmative defense is fully briefed by the parties in summary judgment proceedings, and where the parties have received full opportunity to introduce all evidence pertinent thereto, does an appellate court's reliance on the unpleaded affirmative defense as a ground of affirmance deny due process of law to a defendant against whom summary judgment was granted?

The Petitioner correctly notes that the University did not expressly plead an affirmative defense of novation.[6]

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[6] Ohio R. Civ. P. 8(C) requires that affirmative defenses be pleaded. The rule does not list contractual novation or any similar issue as being within the scope of the rule, nor do there appear to be any reported Ohio decisions which specifically

The University did, however, rely upon the December letter as the governing contractual document in its motion for summary judgment, and the significance of the December letter was vigorously litigated in those proceedings.

Ohio R. Civ. P. 15(B) is virtually identical to Fed. R. Civ. P. 15(b), and recognizes that issues may be tried by the implied consent of the parties.[7] The Supreme Court of Ohio has limited the scope of Ohio R. Civ. P. 15(B) to avoid undue surprise to litigants. In *State ex rel. Evans v. Bainbridge Township Trustees*, 5 Ohio St.3d 41, 448 N.E.2d 1159, 1160 (1983), first syllabus, the Supreme Court of Ohio set forth the following criteria:

> An implied amendment of the pleadings under Civ. R. 15(B) will not be permitted where it results in substantial prejudice to a party. Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case;

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determine contractual novation to be an affirmative defense within the meaning of Rule 8(C). However, the University concedes this point *arguendo*.

[7] Ohio R. Civ. P. 15(B) provides, in material part, that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of trial of these issues."

> whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and whether the witnesses were subjected to extensive cross examination on the issue.

Measured against these standards, there was ample reason for the Court of Appeals to conclude that the contractual significance of the December letter had been fully adjudicated in the summary judgment proceedings, that the Petitioner was not disadvantaged by surprise, and that his due process rights were not adversely affected by the judgment of the Court of Appeals.[8]

Under Ohio law, the elements of a contractual novation have been defined as including –

> a valid, prior obligation to be displaced; the consent of all the parties to the substitution; a sufficient consideration; the extinction of the old obligation; and the creation of a valid new one. *Garrett v. Lishawa*, 36 Ohio App. 129, 132, 172 N.E. 845, 846 (1930).

The University rested its summary judgment position in part upon the theory that the December letter was *the* definitive contractual statement of the conditions under which the Petitioner might achieve tenure. The Petitioner did not object to the introduction of the December letter in evidence. Instead, he responded in his initial memorandum opposing the University's motion for summary judgment by arguing that the December letter was of no

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[8] These issues were before the Court of Appeals in the Petitioner's Application for Reconsideration.

contractual significance because the June letter remained in effect and was not and could not have been replaced by the terms of the December letter; that he did not consent or agree to the terms of the December letter; and that there was no consideration to support the December letter. In short, the Petitioner fully and forcefully argued the subsidiary issues relevant under Ohio law to a determination of whether a contractual novation had occurred. Moreover, subsequent to filing his initial brief, the Petitioner was given the opportunity by the trial court, and availed himself of the opportunity, to file an additional brief and introduce additional evidentiary materials.[9]

Accordingly, the Court of Appeals was not remiss in its implicit determination that the Petitioner fully recognized that the contractual significance of the December letter was at issue, and that he not only had a full and fair opportunity to address the pertinent issues with arguments and evidence, but availed himself of the opportunity to do so. *Bainbridge Township Trustees*, 5 OhioSt.3d at 41, 448 N.E.2d at 1160.[10] While it is true that the word "novation" did not appear in these proceedings until the Court of Appeals issued its decision, that word is not a

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[9] The Petitioner at no stage of these proceedings has shown what additional arguments he might have tendered, or what additional evidence he might have adduced, had the University explicitly characterized the December letter as a novation in its summary judgment motion.

[10] The third factor discussed by the Supreme Court of Ohio in *Bainbridge County Trustees*, cross examination pertinent to the unpleaded issue, is clearly inapplicable where the issue tried by the implied consent of the parties occurs in a summary judgment proceeding.

magic incantation which transformed the nature of the proceedings in the trial court. The Petitioner himself having addressed at the trial level the pertinent issues of a novation theory, he cannot now be heard to claim that he lacked notice and an opportunity to defend.[11]

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[11] The "aggravating circumstances" recited by the Petitioner (Petitioner's Brief 17-23) require little comment. They are of a piece with the allegations of his original complaint that the University colluded with "federal, state, local and private agencies" to subject him and his family to a "continuous program of harassment and illegal surveillance, including electronic eavesdropping, wiretapping, following, breaking and entering and burglary." The Petitioner's unproved, ultimately unprovable, and scandalous allegation that the Ohio courts have entered a conspiracy to deprive him of his rights adds nothing to his case, and is unworthy of this Court's consideration.

CONCLUSION

For the reasons set forth in this brief, an adequate and independent state law decisional ground precludes review by this Court, and, on the merits, the Petitioner is unable to show the claimed deprivation of his due process rights. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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